IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1234 of 1992

For Approval and Signature:

Hon'ble MR.JUSTICE H.H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

STATE OF GUJARAT

Versus

BHULIYABHAI RAMABHAI

Appearance:

MR ST MEHTA, ASSTT. PUBLIC PROSECUTOR for Petitioner

MR RS SANJANWALA for Respondent No. 1, 2, 3, 4

CORAM : MR.JUSTICE H.H.MEHTA

Date of decision: 04/08/2000

CAV JUDGEMENT

This is an appeal under Sec. 378(1) of the Criminal Procedure Code, 1973 (for short "Cr.P.C.) filed by the State of Gujarat, challenging judgment Ex.40 dated 5th September, 1992 rendered by the Judicial Magistrate,

First Class, (Mr. V.J.Mehta), Umargam (who will be referred to hereinafter as the learned Magistrate) in Criminal Case No. 1944 of 1988 which was on his file.

Here in this appeal, appellant -the State of Gujarat, was the Prosecution and respondents were the accused. For the sake of convenience, parties will be referred to hereinafter as the complainant and accused respectively.

2. The facts leading to this Criminal Appeal, in a nutshell, are as follows:-

Complainant -Mohanbhai Ramabhai Halpati is residing in Faliya, near School at village Pali - Dhua. He is serving as a teacher in Gujarati school, since about 8 years before the date of complaint i.e. 4/7/1988. Complainant has four sons. Eldest is Rajendra who is examined as prosecution witness No. 5 at Ex.22. Second son is Natu, third son is Kamlesh and the fourth youngest son is Vilas, and his four sons are residing together under one roof in one house. Complainant has one brother Bhuliyabhai who is accused no.1 in the case. It is an admitted fact that both the parties are related interse. It is also an admitted fact that there is a dispute with regard to lands, in between complainant and accused no.1 and in connection with that dispute, cases have been filed interse in between complainant and accused no.1, as a result of which, accused no.1 Bhuliyabhai was having enimical relations with the complainant.

On or about 3rd July, 1988 at about 3-00 p.m., complainant was doing a work relating to making of fence in his field, and at that time, accused no.1 Bhuliyabhai told complainant that if he (complainant) would claim for his share in the agricultural land, he (accused No.1) would kill him (complainant), and he would cut him into three pieces. After giving such threats, accused no.1 left that place. Thereafter, the complainant went to his home and at about 4-00 p.m. complainant, by driving his motor cycle, went to village Pali -Karmbali to purchase fertilizer. From that village Karmbali, he purchased one bag of fertilizer, and when he came to Rayani Falia in village Pali, he put down that bag of fertilizer from the motor cycle, and at that place, complainant's friend Magan Radaka Varli (P.W.9 Ex.35) who was standing there at that time, asked complainant to give him a lift on motor cycle as he wanted to go to his house. Therefore, the complainant gave a lift to Magan Radaka by allowing him to sit on the seat of pillion rider of Motor Cycle,

and when they both were coming to the village of the complainant, and when they were about to reach near the school, near Falia of complainant, at about 6-00 p.m. accused no.1 Bhuliyabhai raised his hand giving signal to complainant to halt his motor cycle. Therefore, the complainant halted his motor cycle there where Bhuliyabhai was standing on the road. Magan radaka alighted from the motor cycle, and complainant was about to alight from the motor cycle, but in the mean while, accused no.1 inflicted two to three blows of blades of axe on left portion of the chest near the ribs of the complainant. As it was a sudden attack, the complainant fell down on road and at that time, one Arjun Nana (accused No.2) inflicted two to three blows of iron-rod on left leg just below the knee portion, as a result of which the complainant sustained fracture injuries, and he was bleeding. It is further the case of the complainant that Puna Manchhu (accused no.3) inflicted the blows of "Kosh" of plough on both the thies of the complainant. At that time, Sandesh Bhikhu (accused No.4) caused injury on the shoulder of the complainant with the help of iron-rod. All the four accused, by utterring filthy language, gave abuses to the complainant, and thereafter, they had gone away from that place. At that time, Magan Radaka, Kanti Devu (P.W.8) and Raman Ganda (P.W.7) were present there. Thereafter his son Rajendra, complainant's daughter-in-law Pushpa and complainant's wife all rushed to the place of incident, and they all took injured complainant first to their house, and thereafer, in the night time, they brought coplainant, by Rickshaw, to Government dispensary of village Bhilad. It appears from the record tat when complainant was in the hospital, one unarmed Police Constable of Bhilad Out Post, recorded the complaint of complainant at 9-45 p.m. That complaint was sent for registration to Umargam Plice Station, where complainant's complaint was registered at 00-35 hours in the night as CR.No. I 105/88 for offences punishable under Secs. 325-504-506-114 of the Indian Penal Code. Thereafter, the crime of CR.No.I 105/88 was investigated by Senior P.S.I., Umargam, and ultimately he chargesheeted the case against all the accused persons in the Court of the learned Magistrate.

3. The learned Magistrate framed a charge Ex.6 against all the accused persons for offence punishable under Secs. 325-504-506(2)-114 of the Indian Penal Code on 10th August, 1989. On recording the pleas of all the accused, they have not pleaded guilty to the charge, and claimed that they wanted to be tried. Thereafter, prosecution examined 10 witnesses as prosecution witnesses. On declaring by the prosecution that their

evidence is closed, the learned Magistrate recorded further statements of all the accused under Sec.313 of the Criminal Procedure Code, 1973. They have completely denied the entire case of the prosecution. Accused have advanced their case that as there was a dispute with regard to his share in an agricultural land in between complainant and accused no.1, the complainant has lodged a false case due to enmity. Accused have led no evidence in their defence. After hearing the arguments of the learned advocates of both parties and after appreciating evidence led by the prosecution, the learned Magistrate was pleased to come to a conclusion that the prosecution hs failed to prove its case against all the accused, beyond reasonable doubt, and therefore, on 5th September, 1992, by rendering his judgment Ex.40, the learned Magistrate acquitted all the accused under Sec. 248(1) of the Criminal Procedure Code, 1973 for offences for which the charge Ex.6 was framed against them.

4. Being aggrieved against and dissatisfied with the said judgment of acquittal dated 5th September, 1992 rendered by the learned Magistrate in Criminal case No. 1944 of 1988, the State Government has preferred this acquittal appeal under Sec. 378(1) of the Criminal Procedure Code, 1973.

5. I have heard the learned advocates for both the parties at length, in detail. The learned advocate for the respondents has taken me through the evidence and judgment challenged in this appeal. I have gone through the evidence of all the witnesses in between the lines. I have also read the judgment challened in this appeal. It would be profitable to know as to what is the scope and ambit of Sec. 378(1) of the Criminal Procedure Code, 1973, when an appeal is filed by the State Government chalenging the acquittal order passed by the learned Magistrate. In case of RAMESH BABULAL DOSHI vs. THE STATE OF GUJARAT, reported in 1996(2) G.L.H. 206, the Hon'ble Supreme Court has observed in Para 7 on Page 210 as under:-

> "Before proceeding further it will be pertinent to mention that the entire approach of the High Court in dealing with the appeal was patently wrong for it did not at all address itself to the question as to whether the reasons which weighed with the trial court for recording the order of acquittal were proper or not. Instead thereof the High Court made an independent reappraisal of the entire evidence to arrive at the above quoted conclusions. This Court has repeatedly laid down

that the mere fact that a view other than the one taken by the trial court can be legitimately arrived at by the appellate court on reappraisal of the evidence cannot constitute a valid and sufficient ground to interfere with an order of acquittal unless it comes to the conclusion that the entire approach of the trial court in dealing with the evidence was patently illegal or the conclusions arrived at by it were wholly untenable. While sitting in judgment over an acquittal the appellate court is first required to seek an answer to the question whether the findings of the trial court are palpably wrong, manifestly erroneous or demonstrably unsustainable. If the appellate court answers the above question in the negative the order of acquittal is not to be disturbed. Conversely, if the appellate court holds for reasons to be recorded, that the order of acquittal cannot at all be sustained in view of any of the above infirmities it can then and then only reappraise the evidence to arrive at the own conclusions. In keeping with the above principles, we have therefore to first ascertain whether the findings of the trial court are sustainable or not.

6 In case of BANSILAL AND OTHERS vs LAXMANSING reported in AIR 1996 SC 1721, it has been held in Para 9 as follows:-

" Even in appeal against an order of acquittal, no interference will be made with the judgment of the trial court except in rare and exceptional cases where there has been some manifest illegality in the approach to the case or the appreciation of the evidence or where the conclusion of fact recorded by the trial court is wholly unreasonable so as to reliably be characterised as perverse and there has been resultant miscarriage of justice........"

Keeping in mind the above legal position with regard to scope and ambit of Sec. 378(1) Cr.P.C. so far as appeal against acquittal of accused is concerned, now I will discuss the rival contentions of both the parties.

7. Shri S.T.Mehta, the learned APP for the appellate -State has read evidence of all the witneses examined by the prosecution. He has argued that complainant is an injured witness and in such tye of injury case, no injured person would allow the real culprit to go free

from the case and he would see that real culprit is convicted. He has further argued that the learned Magistrate has not appreciated the evidence in its correct perspective and in the manner in which it ought to have been appreciated. He has further argued that the learned Magistrate has given over much importance to the trivial and minor contradictions and discrepancies found here and there in the evidence of the prosecution witnesses. He has further argued that the evidence of the complainant has received corroboration fro the medical evidence as well as an independent witness Ramanbhai Gandabhai P.W.7 (Ex.29). He has further argued that witness Ramanbhai Gandabhai has not been declared as hostile witness and as such his evidence is according to his police statement. He has fairly conceded that admittedly eye witnesses Magan Radaka and Kanti Devu have not supported the prosecution case, but merely because, they are declared as hostile witnesses, benefit of doubt can not be given to the accused because evidence of complainant has received corrobration from the evience of Ramanbhai Gandabhai. In short, Shri S.T.Mehta has argued in such a way that he wanted this court to reappreciate the evidence of the prosecution witnesses and come to a different conclusion other than the conclusion of acquittal arrived at by the learned Magistrate.

8. Shri Sanjanwala, the learned advocate for respondents has vehemently argued that if we go through Para 9 of the judgment Ex.40 challenged in this appeal, we find that the learned Magistrate has critically analysed the evidence of prosecution witnesses, and he has rightly come to a conclusion that there are serious and major contraditions and discrepancies in the evidence of the witnesses, and therefore, the learned Magistrate has rightly come to a conclusion that case against the accused is not proved beyond reasonable doubt. In short, he has supported the judgment of the learned Magistrate.

9. In case of the STATE OF KARNATAK vs. HEMAREDDY, reported in AIR 1981 SC 1417, it is held that it is not the duty of the appellate court, when it agrees with the view of the trial court on the evidence, to repeat the narration of the evidence or to reiterate the reasons given by the Court, the decision of which is under appeal will ordinarily suffice.

Here in this case, I am in complete agreement with the views and findings arrived at by the learned Magistrate. Still, however, this court has thought it fit to discuss the evidence.

10. Here in this Criminal Apepal, the prosecution has examined following 10 witnesses:-

(1) P.W.1 Mohanbhai Ramabhai (injured complainant)

(2) P.W.2 Mohanbhai Chhaniabhai Ex.15 (to prove panchnama of scene of offence Ex.16)

(3) P.W. 3 Shankar Viraji Ex.17 (to prove recovery panchnama Ex.18 which was drawn, for recovery of weapons from all the four accused during the period in between 18-00 hours and 19-00 hours on 5/7/1988)

(4) P.W.4 Bhanabhai Vestabhai Ex.19 (for proving aforeseaid panchnama Ex.18).

(5) P.W.5 Rajendra Mohanlal Dubala Ex.22 (eye witness -son of complainant)

(6) P.W.6 Dr. Kanaiyalal Chandjulal ex.25 (to prove medical certificate Ex.26 issued for injuries noticed by him, when he medically examined the complainant).

(7) P.W.7 Ramanbhai Gandabhai Ex.29(Eye-witness)

(8) P.W.8 Kantibhai Devubhai Ex.33 (Eye-witness).

(9) P.W.9 Mangalbhai Radakabhai Ex.35 (Pillion -rider on Motor Cycle of complainant).

(10) Investigating Officer -P.S.I. Shri Amrutbhai Singabhai Ex.36.

11. Both the panch witnesses P.W. 3 Shankarbhai Viraji and P.W. 4 Bhanabhai Vestabhai have proved the panchnama Ex.18. As per panchnama Ex.18, it is the case of prosecution that on 5/7/1988 i.e. one day after lodging of the complaint, during the period in between 18-00 hrs and 19-00 hrs, all the accused voluntarily appeared before Senior P.S.I. Umargam Police Station along with their respective weapons held by them as described in the panchnama Ex.18, and Investigating Oficer recovered that weapons from accused under Panchnama Ex.18. Merely because, the accused appeared voluntarialy before the police and produced the weapons like axe, iron-rods, "Kosh" of plough etc., it cannot be said that case against the accused is proved beyond reasonable doubt because it is necessary to prove beyond

reasonable doubt that accused inflicted blows of respective weapons which they had held on the body of the complainant, and as a direct result of such blows, the complainant sustained injuries which were noticed by the Medical Officer -Dr. Kanaiyalal Chandubhai P.W.6, who prepared the Medical Certificate Ex.26. Except Ramanbhai Gandabhai, no other eye-witnesses -namely Kanti Devu Ex.33 and Mangalbhai Radakabhai Ex.35 have supported the case of the prosecution, and they were declared as hostile witnesses.

12. Alleged eye-witness Rajendra Mohanlal Dubala Ex.22 is a son of the complainant. The complainant has categorically stated in his complaint Ex.12 that his son Rajendra and Pushapa wife of Rajendra and his (complainant's) wife rushed to the place of incident after accused had gone away from the place of incident, and therefore, naturally these three persons who are near relatives of the complainant must not have seen the assailants as to who inflicted injuries on the body of the complainant, and by which weapons. At this stage, it is required to be noted that there was eninmical relations in between the complainant and the accused no.1 because there was a dispute with regard to share of the complainant in an agricultual land. It is also admitted fact that cross cases have been lodged interse between the complainant and accused, and therefore, naturally it would be very risky to rely on the evidence of Rajendra Mohanlal Dubala, who happens to be a son of the complainant. The learned Magistrate has discussed the evidence of complainant in Para 9 of his judgment. As per that discussion, the complainant has deposed in Para 11 of his deposition that during the course of incident, he had shouted for help, as a result of which, his son, his wife and Ramanbhai Gandabhai who were there near the place of incident, rushed to the place, and therefore, these three persons had come after the incident was over, and therefore, the learned Magistrate has rightly discarded the evidence of Rajendra Mohanlal and Ramanlal Gandabhai.

13. The complainant has specifically stated in his complaint Ex,.12 that when he was, by driving his Motor Cycle, coming towards his house, at about 6-00 p.m. Bhuliyabhai accused no.1 raised his hand giving signal to halt his (complainant's) Motor Cycle, and therefore, he halted his motor cycle and when he was about to alight from the motor cycle, as alleged by him, accused no.1 inflicted blows of axe on his chest.

14. Now, if we read the evidence of the complainant,

we find that he has deposed in his examination-in-chief that when he was, by driving his motor cycle, coming towards his house, one Forest Guard -Kantibhai Devubhai who was standing on the road near the school, got his motor cycle halted and in the mean time, accused rushed there and he was injured, and therefore, on the material point as to who got his motor cycle halted, there is a complete variation between the complaint Ex.12 and the evidence of complainant. The learned Magistrate has discussed about many contradictions and discrepancies which he found in the evidence of the complainant in Para 9 of his judgment Ex.40. The learned advocate Shri Sanjanwala representing the respondents had brought to the notice of this court to these contradictions one by one by reading the portion of discussion about evidence in Para 9, separateely for each contradiction and discrepancy. The learned Magistrate has not straightway discarded the evidence of the complainant and eye-witness Ramanbhai Gandabhai. He has, by critically analysing the evidence, apprecited the evidence of the complainant as well as Ramanbhai Gandabhai and then by giving reasons, discarded the said evidence.

15. At this stage, it is required to know as to " what is appreciation of evidence ?", which is generally referred to in every judgment. The process of appraising the evidence led by two parties can be equated almost to the process of holding a balance, - the time honoured symbol of justice. Sometimes when the two pans of the balance are seemingly equal, even a slight evidence, circumstantial or otherwise, tilts the balance on one side and thereby probabilises the case of one party as against the other. In this process of holding the balance what pieces of evidence, of course excluding inadmissible evidence, would lean the balance in favour of one party is dependent on the evidence available in a given case. But asking the revisional court to say that this piece of evidence should have weighed more than the other is nothing more than seeking a reassessment of evidence. Appreciation of evidence is a mental process involving selection, assessment and conclusion. Which statement ought to weigh and how much, cannot be rigidly laid down.

16. In view of above legal position with regard to appreciation of evidence, it is revealed that the learned Magistrate of the trial court appreciated the evidence and discussed thee same in his judgment and thereafter he has come to a conclusion that the prosecution has failed to prove his case beyond reasonable doubt. Shri

Sanjanwala, the learned advocate for the revision opponents, has submitted the following grounds to say that the prosecution has not proved its case beyond reasonable doubt:-

(i) There are several major and serious contradictions in evideence of witnesses of prosecution and that contradictions are brought out in cross-examination of the Investigating Officer and that contradictions are narrated in Para 9 of the judgment;

(ii) Though, independent witnesses were available to the prosecution, the prosecution has not examined the independent witnesses in support of the case. It may be noted that as per the complaint, when the complainant was coming, by driving the motor cycle towards his house near place of incident, accused no.1 raised his hands and gave a signal to halt his motor cycle. While in the examination-in-chief of the complainant, he has deposed that one Forest Guard -Kantibhai Devubhai gave a signal and got his motor cycle halted. That Kantibhai Devubhai must be an eye-witness to the incident as per the evidence of the complainant. That Kantibhai Devubhai (P.W.8) is examined at Ex.33, but he has not supported the case of the prosecution, and he was declared as hostile witness by the prosecution. Thus, independent witness Kantibhai Devubhai has not supported the case of the prosecution, though as per the evidence of the complainant, he was present at the place of incident. As stated earlier, Maganbhai Radakabhai, who was a pillion rider on the motor cycle, has not supported the case of the prosecution. As per the complaint, Ex.12, incident took place at about 18-00 hours on 3rd July, 1988. It was a month of July, and therefore, it was a time for the villagers to come back to their respective houses from their respective fields, and therefore, when the incident took place near the school on the road, other persons must have seen the incident. The prosecution could have examined any of such outsiders who saw the incident.

(iii) As per the evidence of Dr. Kanaiyalal, present coplainant was brought to him in Community Health Center of village Bhilad without Police Yadi. Therefore, the complainant was first taken to that Community Health Center where he lodged the

complaint, and therefore, naturally the complainant could not have been brought with the Police Yadi but on reading the Medical Certificate Ex.26, we find that the complainant did not give any history for injuries sustained by him. He would have at least stated to Medical Officer that he sustained injuries by assault. In cross-examination of Dr.Kanaiyalal, a case has admitted that the injuries nos. 1 to 5 recited in the Medical Certificate Ex.26 can be possible, if a person driving motor cycle suddenly applies the brakes of a motor cycle at the place where there is a curve and while doing so, if he is thrown off, from the motor cycle and falls on the ground facing the ground. Looking to this admission on part of Dr. Kanaiyalal, this possibility stated by Doctor cannot be ruled out because the complainant has admitted in his evidence that he was proceeding from west to east and that the road was having down-ward slope from west to east, and therefore, when it was a sloppy road, possibility of applying brakes suddenly cannot be ruled out, because at that moment, the speed of the motor cycle would have been accelerated due to slope.

(iv) Looking to the evidence of the complainant, first accused no.1 inflicted blows of the blade portion of an axe on chest of the complainant, as a reult of which he fell down on the road and simultaneously, other accused inflicted injuries. In view of this fact, the injuries would be possible on the backside of the complainant, because no person would remain in a static condition when about four persons had indiscriminately assaulted him. In this case, not a single injury was noticed by Dr. Kanaiyalal on backsie of the body of the complainant.

(v) Admittedly, there was enimical relations between the complainant and accused persons. This enmity can be a double edged weapon both for the prosecution as well as accused. It can be said that because there was enmity between the complainant and the accused no.1, the complainant lodged a false complaint to involve the accused no.1. Same way, because of enmity, the accused no.1 might have assaulted the complainant. In view of this fact, this case becomes very much doubtful and when there is no certainty in the

evidence of prosecution witnesses, because of enmity, benefit of doubt should be given to the accused.

17. I have gone through the evidence of each witnesses of prosecution in between the lines, and I have found that in no case, it can be said that there was a manifest illegality in the approach of the learned Magistratee to appreciate the evidence. It cannot be said that when the appreciation of evidence was correctly made, the conclusion of fact recorded by the learned Magistrate is wholly unreasonable. In no case, it can be characterised as perverse, and therefore, looking to guidelines given by the Hon'ble Supreme Court in case of Ramesh Babulal Joshi (supra), here in this appeal, it cannot be said that the reasons recorded, which weighed with, the learned Magistrate were not proper. When the Hon'ble Supreme Court has specifically held that a mere fact that view other than one taken by the trial court can legitimately be arrived at by the appellate court, on reappraisal of evidence cannot be constituted as valid and sufficient ground to interfere with the order of acquittal. Here in this appeall, Shri S.T.Mehta, learned APP for the appellant -State has vehemently argued in such a way that he indirectly requested this court to reappreciate the evidence afresh which is not possible because of well-settled legal position of law.

18. In view of what is discussed hereinabove, this court finds that this is not a fit case for interference in the final decision arrived at by the learned Magistrate, and therefore, this appeal is devoid of merits. It deserves to be dismissed, and therefore, accordingly it is dismissed. Rule is discharged.

Date: 04/08/2000. (H.H.MEHTA,J.)
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